Supreme Court of United States.

JOHN McK. GUNN
v.
CHARLES F. BARRY.
} No. 185.

Validity of Exemption Acts as to past Contracts.

Brief of P. PHILLIPS,

For Plaintiff in Error.

H. Polkinhorn & Co., prs., Washington, D. C.

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Gunn filed his petition in one of the Superior Courts of Georgia, praying for a mandamus, commanding Barry the sheriff of the county to levy a *fi fa*, issued on a judgment recovered in said court at its May Term, 1866, againt one Hart. The petition for the writ states, that the sheriff refused to levy on the land of the defendant in execution, to wit, 272½ acres, on the ground that the same had been set apart as a homestead for the family of said defendant by virtue of the act of 3 October, 1868.

The petition further avers that this tract of land is all the property owned by the defendant subject to his judgment—that it is worth $1300—that this is a much larger exemption than existed at the time the contract was entered into, and when the judgment was rendered; and that the act of 1868, so far as it applies to judgments rendered prior to its passage is in violation of the Constitution of the United States.

The court refused the mandamus, holding the act to be valid and a sufficient excuse to the sheriff, to which judgment the petitioner excepted and prayed that the same be certified to the Supreme Court of the State, which was done. See bill of exceptions, p. 4.

In the Supreme Court this judgment was affirmed. McCay, J., dissenting, and from this judgment the present writ of error is prosecuted.

ASSIGNMENT OF ERROR.

The judgment affirming that the act of 1868 as applicable to the pre-existing judgment in favor of McK. Gunn was not in conflict with the constitutional prohibition on the States, forbidding them to pass laws impairing the obligation of a contract.

The 1st section of 7th art. of the constitution of 1868 provides that "each head of a family, or guardian or trustee of a family, of minor children shall be entitled to a homestead of realty to the value of $2,000 in specie, and personal property to the value of $1,000 in specie, to be valued at the time they are set apart, and no court or ministerial officer in this State shall ever have jurisdiction or authority to enforce any judgment, decree, or execution against said property so set apart, including such improvement as may be made thereon from time to time, except for taxes, money borrowed or expended in the improvement of the homestead, or for the purchase money of the same, and for labor done thereon, or material furnished therefor, or removal of incumbrances thereon."

The 1st section of the act passed 3 October, 1868, is in the precise same terms.

See Pamphlet Acts, p. 5, No. 2.

The question was first presented to the Supreme Court of Georgia, in the case of Hardeman v. Downer, reported in 39. Geo., 450, a majority of the three judges held the act valid. Warner, J. dissenting.

The decision in the present case, McK. Gunn vs. Barry, is reported in 44. Geo. 352, and in this case, McCay, J., dissented on a technical ground relating to the mandamus. Judge Warner, assented to the judgment so that the case might be brought to this court, and the question finally disposed of. In point of fact, therefore, a majority of the court held the act to be constitutional.

In the case thus presented to the court, we have an act of legislation which not only impairs the obligation of a contract, but takes away the lien which the law had conferred for its enforcement.

The lands in question were so bound by the judgment, that no title thereto could be transferred even to a *bona fide* purchaser, except subject to that incumbrance. In other words, the plaintiff, by his judgment, had acquired an interest in the lands to the extent of the sum awarded by it.

This act is not one which merely *changes* the remedy, and as to which there has been much discussion. Undoubtedly the State has control over the remedy, but it is well established by frequent and familiar decisions of this court, that in the exercise of this power the State cannot so materially affect the remedy as to depreciate or lessen the value of the obligation.

Here the act goes much further—it takes away *all remedy*. When the contract was entered into it constituted a *legal* as well as a *moral* obligation. The act now steps in and takes away its *legal efficacy*, and leaves nothing but a moral or imperfect obligation.

The main ground upon which acts of this character have been sustained, is, that an ordinary obligation gives no lien on the property of the obligor, and, therefore, when the act deprives him of the right to look to that property for payment, it takes away nothing he had contracted for.

These premises are unsound. In a country where the existing laws give the right to the creditor to enforce, by judicial proceedings, the performance of the obligation, and declare that all a man's property shall be held responsible to such judgments as the courts may award, it is not unsafe to say, that more contracts are entered into on the faith of the property possessed by the contracting debtor than on the trust of his personal integrity.

To take away, therefore, the legal remedy from contracts thus entered into, is to destroy a material portion of the consideration which induced their execution.

The right to enforce the contract by legal process enters into the contract itself, and when that right is taken away its obligation is impaired.

Whatever difference of opinion may have existed on this subject among the State tribunals, and whatever doubt may have been created by some general remarks of the Chief Justice in the case of Sturgiss, v Crowningshield, (4. Wheat 200,) the more recent decisions of this court, seems to place the unconstitutionality of these retrospective acts beyond question or controversy.

The decision in the case cited, undoubtedly led to many of the decisions of the State courts, and probably to the passage of many of such acts.

Kent, appreciated this danger and spoke of the language used by the Chief Justice as general, latitudinary

and hazardous. "It seems (says he) to lessen or take away from the extent and efficiency of the remedy to enforce the contract, legally existing when the contract was made, and thus impairs its value and obligation."

In 1843 the subject was fully considered in the opinion of Taney, C. J. in the case of Bronson vs. Kenzie. The only dissent was on the part of McLean J. who relied upon the decision in Sturgiss vs. Crowningshield.

In the opinion of the court, after quoting the strong expressions used in Green vs. Biddle, decided in 1823, (8 Wheat 1,) and which was twice argued and unanimously decided—it is said:

"We entirely concur in the correctness of the rule above stated. It is difficult perhaps to draw a line between legitimate alterations of the remedy, and provisions which, in the form of remedy impair the right. But it is manifest that the obligation of the contract, and the rights of a party under it, may in effect, be destroyed by denying a remedy altogether; or may be seriously impaired by burdening the proceeding with new conditions aud restrictions so as to make the remedy hardly worth pursuing. And no one, we presume, would say that there is any substantial difference between a retrospective law declaring a contract to be void, and one which took away all remedy to enforce it, or incumbered it with conditions that rendered it useless or impracticable to pursue it." (1 How., 318.)

It is only necessary to add the decision of this court made in 1866, in the case of Van Hoffman v. City of Quincy, (4 Wall, 548) in which there was no dissent. The previous decisions are elaborately reviewed.

"Nothing, (say the court,) can be more material to the

obligation than the means of enforcement; without the remedy the contract may, in the sense of the law, be said not to exist, and its obligation to fall within the class of those moral and social duties which depend for their fulfilment upon the will of the individual. The ideas of validity and remedy are inseparable, and both are parts of the obligation which is guaranteed by the Constitution."

While, therefore, it is to be admitted that the power of the State extends to the remedy, and may, to a certain extent, exempt property from execution, it does not follow that this exemption may be carried to any extent. Admitting the power it may often be difficult to draw the line which limits its proper exercise. But there are cases in which its exercise is so gross a fraud upon the Constitution as to free it from all doubt; and such is the case before us.

In all civilized countries, time out of mind, the principles of humanity have induced the Legislature to intervene between the debtor and his creditor, and to prevent the latter from stripping his debtor of those articles which are necessary to his existence. When, therefore, a contract is entered into, it may be assumed that the creditor contracts with the full recognition of the right of the Legislature over this subject; and when this right is legitimately exercised he can have no ground of complaint.

Prior to the decision, cited from 4 Wall, this subject was presented to the Court of Appeals of New York, (January, 1848, Banks v. Quackenbush, 1 Coms., 129.) That case turned on the Constitutionality of the act of 1842, which in addition to existing exemptions, exempted "necessary household furniture, working tools, and team, owned by any person being a householder, or hav-

ing a family for whom he provides, to the value not exceeding $150." The judgment below was against the validity of this act, and in the Court of Appeals this judgment was affirmed, but by a divided court; Jewitt, C. J., and Bronson, Ruggles, and Gray Justices for the affirmance.

In 1854, the same question was presented to the Court of Appeals, in the case of Morse v. Goold, 1 Ker., 282, when the Court held the act to be *valid*. This decision was also prior to that in Van Hoffman's case.

It is then to be noted that the act of exemption dealt with by the Court of Appeals was one which fell within the usual exercise of State power. The articles exempted were of small value and necessary to enable the debtor to live.

In the dissenting opinion, in the first case, while asserting the validity of the act in question, Judge Gardiner was evidently pressed by the consideration that the power claimed for the State must have a limit, and that the judicial tribunals were authorized to judge of its proper exercise.

At p. 139, after asserting the established distinction between the power of the State over the *contract*, and over the *remedy*, he says—"The States may legislate upon *all* remedies; they must do it, for they have the exclusive power, so far as they relate to their own courts, *but they may not abuse that power*, in reference to *any* remedy, so far as to destroy the beneficial effects of the contract. They may exempt the bed of the debtor, but it does not follow that they may a farm worth $20,000. The first would be a *fair exercise* of authority, the last an *abuse* of of it. If between these extremes there is no well defined middle ground, it is because our national court has claimed the right to supervise State legislation upon

the subject, not merely by entertaining the question whether *any* remedy was afforded, but whether a substantial one was provided for the creditor; what is their right and duty is ours, and that of every other court from the lowest to the highest."

Again, "We must enter this *terra incognita*, explore it by the aid of those lights, which experience and the knowledge of the state of society among us will afford, and determine for ourselves primarily, whether the particular law *transcends the limits of fair legislation*, and is in *effect*, whatever may have been the motives of its framers, a *fraud* upon the Constitution, we ought not to purchase judicial certainty, by an unqualified surrender of State power."

In the opinion delivered by Denio, J., in Morse v. Goold, while claiming the power of the State over the remedy, he says, "But it is admitted, that a contract may be virtually impaired by a law, which without directly acting upon its terms, *destroys the remedy, or so embarrasses it*, that the rights of the creditor, under the legal remedies existing when the contract was made, are substantially defeated. *With this necessary qualification*, the jurisdiction of the States over the legal proceedings of their court, is supreme." (p. 287.)

Again, after reviewing the decisions of this court it is said, "I do not understand either of the cases to determine that the law respecting legal procedure in existence when the contract was made cannot be changed in such manner as to operate upon existing contracts. In the able and discriminating opinion of Chief Justice Taney, in the first case, the right to make such changes is distinctly asserted; and if the opinion in McCracken v. Heyward, holds the contrary, it was unnecessary to go that length; and the doctrine would be hostile to the

principle of several prior cases, and an unwarantable restriction upon the powers of the State Governments. It is evident the court did not intend to embrace a case like the one under service. The Chief Justice expressly declares, in giving the opinion of the court in Bronson v. Kenzie, that a State legislature may, "if it think proper, direct that the necessary implements of agriculture, or the tools of a mechanic, or articles of necessity in household furniture, shall, like wearing apparel, not be liable to execution on judgments." He refers also to the decision in Planters' Bank v. Sharp, 6 How., in which the exemption as to such articles was also sustained.

We do not see in either of the decisions of the Appeal Court any material departure from the principles announced by this court.

The act, whose validity was thus maintained, may have received the sanction of this court under the adjudications referred to, for in Van Hoffman's case it is declared after asserting the right of the state to abolish imprisonment for debt, as this was regarded as penal rather than remedial, that the State may also "exempt from sale under execution, the necessary implements of agriculture, the tools of a mechanic, and articles of necessity as household furniture. Regulations of this description have always been considered in every civilized community as properly belonging to the remedy, to be exercised by every sovereignty according to its own views of policy and humanity." (p. 553.)

Conclusion.

As applied to the act now before the court the principles announced leave no doubt of its invalidity.

There was great inducement to this kind of legislation in the Southern States, arising out of the disasters of the war. But while much be said in extenuation, nothing can be judicially said in justification of it.

The following exemptions have been made:

Florida	$1,000
Tennessee	1,250
South Carolina	1,500
North Carolina	1,500
Louisiana	2,000
Georgia	3,000
Mississippi	4,000
Arkansas	7,000

With the operation of these exemptions on subsequent contracts we do not deal. The power of the State is ample, and contracts made under such laws are referrable to them. It is in this view a political, not a judicial question. But when such exemptions are applied to past contracts their illegality is self evident.

We take the case of the Georgia act which exempts $3,000, of which $2,000 was of land in gold value. This was at a period when lands were greatly depreciated. The State had not recovered from the embarrassments of war—all were sellers—there were few buyers. In this depreciated condition the law assigns land to the value of $2,000 in gold. Such lands then assigned, would to-day bring three or four times the amount.

The population of the State is estimated at 1,500,000. Under the law every head of a family is entitled to $2,000 in land. Assuming that five persons constitute a family, we have 300,000 heads of families, and if each "head" obtained the $2,000 in land, the law appropriates land to the amount of $600,000,000. *This is three times more than all the land in the State is estimated at!*

If such an act can be sustained there is no virtue in the constitutional prohibition.

P. PHILLIPS,
For Plaintiff in Error.

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